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FOR THE EXCLUSIVE USE OF THE INTERPRETATION SERVICE OF OF THE COURT OF JUSTICE OF THE EU

At the Oral Hearing on 24th March 2015 in Case C-362/14:

MAXIMILLIAN SCHREMS

Applicant

V.

DATA PROTECTION COMMISSIONER

Respondent

AND

DIGITAL RIGHTS IRELAND LIMITED

Amicus curiae

Oral Speaking Notes of Maximillian Schrems

Pleading: Noel J. Travers, Senior Counsel, Bar of Ireland *and*

Professor Dr. Herwig Hofmann, Rechsanwalt, Cologne Bar (Germany).

With them, Mr. Paul O'Shea, Barrister, Bar of Ireland.

Instructed by: Mr. Gerard Rudden, Solicitor, Ahern Rudden Solicitors, 5 Clare Street, Dublin 2, Ireland.

President, Members of the Court, *Advocate General*

I. Introduction

1. Mr. Schrems is a European Facebook user. He has complained about the transfer of his personal data by Facebook Ireland to Facebook in the USA. There, under US law, that data is subject to **'*mass and indiscriminate*' general surveillance**. We submit that such a form of mass surveillance is manifestly incompatible with the fundamental right to privacy and data protection for which Union law provides. Some of those who have submitted written observations, most notably the Commission, the DPC and the UK, appear to think that a finding under Article 25 of Directive 95/46 may override higher ranking EU law. We disagree and observe that the Commission's position is plainly at odds with that set out in its 2013 Communications, referred to in the Court's third set of questions.

II. More serious breach here than in *Digital Rights Ireland*

2. In ***Digital Rights Ireland*** you held that indiscriminate *retention* **<u>within</u>** the EU of data provided for by Directive 2006/24 (the Data Retention Directive) was incompatible with the fundamental right to

privacy guaranteed by Union law, and annulled that Directive. We welcome that judgment. The principles it so clearly enunciates apply *a fortiori* to the far more egregious breach of the right to privacy involved in this case.

3. It involves surveillance that is manifestly incompatible under Articles 7 and 8 of the Charter - especially when taking into consideration that you held in ***Digital Rights Ireland*** that even limiting surveillance to a mere retention of data, and notwithstanding that the Data Retention Directive at issue imposed time limits and allowed citizens judicial redress, it was incompatible with Articles 7 and 8 of the Charter. Here, the relevant US surveillance laws lack all of these elements – amounting to an unfettered surveillance of all personal data of non-US citizens.

4. The interference is so serious that it violates, as the European Parliament and Italy also submit, the **essence** of the right to privacy and data protection under the Charter. This is clear from the finding in ***Digital Rights Ireland***, where you held (paragraph 39), that Data Retention Directive did not as such adversely affect the essence of those rights because it "*does not permit the acquisition of knowledge of the content of the electronic*

communications." US surveillance does exactly that: it grants access to the content of all data.

5. US law allows, as the referring court has found, permits "*mass and undifferentiated*" surveillance by its public authorities to personal data "*on a casual or generalised basis*", in circumstances where those authorities are not even required to provide "*objective justification*". Critically, as the referring court has further found, the available access is neither "*based on considerations of national security*" nor on "*the prevention of crime specific to the individual*". Moreover, the access is not "*attended by appropriate and verifiable safeguards*".

6. It is difficult to conceive of a more serious violation of the essence of fundamental right in EU law to personal data privacy. It is manifestly more serious than the "*wide-ranging particularly serious interference*" identified and declared disproportional in ***Digital Rights Ireland*** (at paras 37 and 65).

III. Validity of the so-called 'Safe Harbour Decision', Decision 2000/520

7. By finding adequacy in the light of these facts, the Decision 2000/520 violates both its own legal basis (Article 25 of Directive 95/46) and higher ranking Union law. I will address validity by reference to legal base in answering the Court's questions.

- **Decision's Compatibility with Higher-ranking Union Law**

8. Measures based on Directive 95/46 – as in fact any measure taken by any EU institution – must comply with EU fundamental rights, as explicitly confirmed in the ***Kadi*** case-law. Article 1(1) of Directive 95/46 specifies its objective as being to protect "*fundamental rights*", particularly the "*right to privacy with regard to the processing of personal data*". From this, it is clear that the **right to privacy** offers protection against **both** public and private infringements.

9. The possibility of **generalised surveillance** by US security agencies of data transferred for storage at Facebook Inc. (USA) by Facebook Ireland, under domestic US legislation like the Foreign Intelligence Services Act (FISA) manifestly comprises a form of processing and, thus, an ***interference*** with the data subjects' fundamental rights. There is no protection from such interference in the USA.

10. Although the questions referred do not formally concern the validity of Decision 2000/520, it has been clear since your early case-law in Case 16/65 ***Schwarze***[1] that, when interpretation of an act is requested in a preliminary reference, the Court is entitled *firstly* to consider the act's validity. In any event, we submit that the order for reference and the questions referred raise, by necessary implication, the validity of the Decision, and invalid we submit it is.

IV. CJEU's Written Questions for Definition of Position

11. Turning rapidly to the Court's written questions, we will seek to define our position with regard to them succinctly. Underlying our position, is the duty of national authorities and the Commission to protect against the violations of the right to privacy.

- **Question 1**

12. By the introduction to and **the first two parts of its first question**, the Court identifies the obligation of the Commission to interpret its power under Article 25 of the Directive in the light of the overriding requirements of the fundamental right to privacy. Compliance

[1] [1965] ECR 886.

therewith is a precondition for the valid adoption by the Commission of a decision under Article 25.

13. Although Member States national supervisory authorities are of course bound by the laws that apply to them, they, of course, include EU fundamental rights. However, any such national legal provision cannot, whether on its face or by interpretation, have the effect of precluding such an authority from carrying out an independent investigation of a reasoned complaint.

14. It would be the very antithesis of independence, if a supervisory authority were to be "*absolutely bound*" by a finding of fact in a Commission decision under Article 25(6). Consequently, our position is that national authorities established pursuant to Chapter VI of the Directive, when called upon by a complaint to investigate the adequacy of protection provided for in a third country, have the duty to investigate the complaint.

15. Regarding, the **third part of the first question**, any rules governing the limitation of international data transfers must allow national supervisory authorities to protect the fundamental rights of the data subject. **Article 3(1)(b)** of the Decision does not even allow this basic leeway. Of its cumulative requirements, the first

relates to the compliance with the SHPs. It requires that the annexed self-described "Safe Harbour Principles" ("SHPs") are being violated. Consequently, it requires that an *annexed, foreign* text to the Decision, which text is subject, as to both its interpretation and compliance, to US law (see 6th paragraph of the SHPs in Annex I) be violated, in circumstances where the text itself is also subject to any overriding legal act under US law (see 4th subparagraph, SHPs). This is a wholly unacceptable benchmark for possible intervention by national supervisory authorities. It plainly prevents them from performing their duty to protect the fundamental rights of Union data subjects whose personal data is transferred to the USA.

16. The Commission and some of the intervening Member States refer to the reference to "*necessary*" in the fourth subparagraph of the SHPs to claim that this allows the application of an EU-law type proportionality requirement. Nothing could be further from the truth. As is clear from the fourth paragraph of the SHPs, the reference is either to foreign public interest **or** to what is necessary to comply with any legal act under US law, such as the FISA.

17. As for the Commission's argument in its written observation relating to the third of the cumulative requirements in Article

3(1)(b), *i.e.* the need to demonstrate an imminent risk of grave harm, we submit that a breach of the **essence** of a fundamental right, such as the right to privacy and data protection, comprises manifestly harm of the **most grave and serious** kind.

18. If, however, the Court considers, notwithstanding our submissions, that Article 3(1)(b) may be interpreted in a manner that renders it compatible with the Directive and higher-ranking Union law, we submit that a national authority in the position of the respondent DPC in this case has a duty to investigate the complaint and suspend data flows to the USA, as submitted by Poland, Austria and Slovenia.

- **Question 2**

19. Briefly, with regard to **the first part of the second question**, our position is that an "*adequacy decision*" under Article 25(6) of Directive 95/46 must fulfil **both** the material requirement under Article 25(2), which sets out and defines a requisite "*adequate level of protection*" **and** the **additional formal requirement** under Article 25(6) for such an "adequacy finding"; *i.e.* that the protection must be provided by a "*domestic law*" **or** by a binding "*international*

commitment" by the third country concerned as an international legal person.

20. The SHPs, which is all that the Decision concerns, fall plainly short of both requirements.

21. Obviously, those self-styled principles do not comprise a "**law**" or an **"international commitment**", cognisable under the Vienna Convention on the law of Treaties They are a mere publication of self-styled "*principles*" and so-called "*frequently asked questions*" that appear on a webpage of a US government department, the US Department of Commerce.

22. With regard to the **material level of protection**, we rely fully upon our detailed written observations and upon the in-depth analysis of Professor Boehm at Annex A.1 thereto regarding the adequacy of privacy protection under the SHPs and FAQS.

23. In summary, self-certification under the SHPs by entitles like Facebook Inc., especially if overruled by laws like the FISA, cannot provide adequate protection under Article 25 of the Directive. This

is *a fortiori* the case as the SHPs do not apply to US public authorities.

24. Regarding the **second part of the second question** of the Court, our position is yes: a genuine "*adequate level of protection*" under Article 25 of Directive 95/46 would manifestly require, having regard to the need to ensure that effect is given to Article 47 of the Charter and Article 8(3) thereof, in particular, as regards data protection, as well as Article 13 of the ECHR, the availability of an effective judicial remedy for data subjects in the third country concerned.

25. Regarding penultimately the **third part of the second question**, although the Decision was adopted before the Charter entered into force, our position is that privacy protection was assured, at the time, by the general principles of EU law arising from the ECHR and constitutional traditions in particular. The main problems with the Decision all existed also at the time of its adoption. In particular, it was uncontested that the formal requirements of Article 25(2) of the Directive were not satisfied by the US legal system. We refer, in particular, to Professor Boehm's analysis in the Annex I to our written observations and to paragraphs 30-33 of those observations.

- **Question 3**

26. Finally regarding the **third question**, our position is that the Commission has stated publicly on multiple occasions that the Decision needs to be corrected. It was illegal then over 15 years ago and it is even more illegal now. Indeed, it was clear from recital 5 to the Decision 2000/520 that there was, even in July 2000, merely an aspiration by the Commission that the SHPs would achieve their stated objective of adequate protection. However, the ***Kadi*** case-law makes clear that respect for fundamental rights **is a condition for the validity of Union acts**. Thus, once it became clear to the Commission that its aspiration was hopelessly optimistic as regards the USA, it should have suspended Decision 2000/520.

27. Finally, invalidating the Decision would merely place those US companies who have self-certified into the normal position in which virtually all other non-EU companies, including may US companies, are.

V. Conclusion

28. Accordingly, we respectfully request the Court to answer the questions referred as proposed in paragraph 77 of our written observations.